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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

YAO CHIANG, Plaintiff and Respondent, v. RAYNE L. CHEN, Defendant and Appellant.	H045059 (Santa Clara County Super. Ct. No. 1-13-CH004896)

Defendant challenges the trial court's denial of his motion to set aside a renewed civil harassment restraining order entered in his absence, asserting ineffective personal service of the hearing notice. Finding no deficient service or abuse of discretion, we will affirm the order.

I. BACKGROUND

The trial court issued a three-year civil harassment restraining order to protect plaintiff from defendant. The order was issued in June 2013 after a hearing at which both parties appeared and represented themselves. Eighteen months later, defendant requested a reciprocal restraining order protecting him from plaintiff. Plaintiff retained an attorney and opposed the request. The request was denied and plaintiff was awarded attorney's fees.[1] Defendant then moved unsuccessfully to vacate the June 2013 order. Later in

[1] On our own motion, we take judicial notice of the trial court's file in this case to fully understand the docketing entries on the register of actions. (Evid. Code, § 452, subd. (d).)

2015 defendant was ordered to show cause why he should not be held in contempt for failing to pay plaintiff's attorney's fees award, but the matter was not adjudicated. Defendant also sued plaintiff for malicious prosecution.

In June 2016 plaintiff sought to renew the restraining order. Counsel noticed a hearing for July 19, hired a process server to serve defendant with the request and hearing notice (which maintained the restraining order in effect until the hearing), and filed a proof of service indicating personal service had been made on defendant at his home on June 22. Defendant did not appear at the hearing, and the restraining order was renewed to June 2021 in his absence.

In November 2016 defendant moved to set aside the renewed order, arguing he had not been personally served and had received no notice of the July hearing. He argued that the renewed order should be set aside based on surprise under Code of Civil Procedure section 473, subdivision (b), and based on equity for extrinsic fraud or mistake. Defendant declared that he first learned of the restraining order when he received it in the mail on August 1, 2016, and the next day he asked his attorney to have the order set aside so that he could be heard on the matter. He stated he was in the East Bay on June 22 when the process server came to his home.

Defendant's attorney declared that he represented defendant in a malicious prosecution action against plaintiff that settled in October 2016; defendant had sent him the renewed restraining order on August 2, 2016; and he received proof of service from plaintiff's attorney requested on August 3. According to counsel's declaration, in November 2016 he asked plaintiff's attorney whether plaintiff would agree to having the restraining order set aside or allowing defendant to challenge the renewal on the merits. Receiving no response, defendant filed the motion which is the subject of this appeal.

Defendant's attorney took the process server's deposition and filed a supplemental declaration attaching the deposition transcript and the process server's notes documenting the manner of service. The notes stated, "I've served here before – son answered door –

said he'd go get him. Heard the son say 'It's for you.' The subject responded. The son then said 'It's a delivery for you.' Subject told him to tell me he wasn't home. I announced service & left x on floor & told subject the documents were at the front door & left." The process server testified at his deposition that he had been to defendant's house before. He had been hired a few times to serve defendant, and on at least one occasion before June 2016 he had personally served defendant. In 2015 he had been authorized to stakeout defendant's home to serve defendant with an order to show cause and affidavit regarding contempt, and at some point after the stakeout, he succeeded in personally serving defendant.

Regarding the June 22 service, the process server explained in his deposition testimony: "I walked up to the door, knocked on the door, and a heavy-set Asian male answered the door. I believe it's his son from previous attempts. High school, college age, early college age. Answered the door. [¶] I asked for the subject, told him I had a delivery for him. [H]e said let me go get him and he walked to the right. I could hear his conversation between him and the subject. He said that it's for you. [¶] [T]he subject responded back to him. His son said again to him it's a delivery for you. He told his son to tell him that – tell them that I'm not home. Son came back to the door, told me he wasn't home, and at that point I announced service, told [defendant] that he was being served with a restraining order and the documents were at the front door." The process server stated he placed the documents on the floor with the son standing in the doorway, and left. He wrote in his notes and testified that two cars were in front of the house, a Mercedes and a Toyota. One car was in the driveway and the other car was either in the driveway or on the street in front of the house.

The court denied defendant's motion in a written order after a hearing, finding that deposition testimony and the process server's contemporaneous notes "provided persuasive evidence that [defendant] was properly served." The denial was "without

prejudice to any remedies otherwise available" to defendant. Defendant has appealed and filed an opening brief in this court. No respondent's brief was filed by plaintiff.

II. DISCUSSION

We review orders denying relief under Code of Civil Procedure section 473, subdivision (b) and equitable relief to vacate a default judgment for abuse of discretion. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897–898; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.) "In so doing, we determine whether the trial court's factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions." (*Gorham*, at p. 1230.) We will not disturb the trial court's determination of controverted facts, and we may reasonably infer all facts in support of the trial court's decision. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387.)

The Legislature requires personal service of a notice of hearing to renew a civil harassment restraining order. (Code Civ. Proc., § 527.6, subd. (m).) Personal service is service "by personal delivery" (Code Civ. Proc., § 415.10), and " 'usually contemplates actual delivery.' " (*Crescendo Corp. v. Shelted, Inc.* (1968) 267 Cal.App.2d 209, 212 (*Crescendo Corp.*); *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 832 [" 'Personal service' means the actual delivery of the papers … in person."].) Under a well-established line of authorities, however, hand-to-hand delivery is not required to accomplish personal service when a target attempts to flee or avoid service.

In *In re Ball* (1934) 2 Cal.App.2d 578 (*Ball*), a process server approached the target in the same location he had formerly served the target. About 12 feet from the target and with the process in his hand, the server said: " 'I have here another one of those things for you.' " (*Id.* at pp. 578–579.) The target replied, " 'You have nothing for me.' " While looking at the process server, he started to walk away, and the server handed or tossed the process toward the target, saying " 'Now you are served.' " (*Id.* at p. 579.) The papers fell close to the target, who left without picking them up. (*Ibid.*)

The *Ball* court found substantial evidence of personal service, cautioning "when men are within easy speaking distance of each other and facts occur that would convince a reasonable man that personal service of a legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand." (*Ibid.*)

The target in *Trujillo v. Trujillo* (1945) 71 Cal.App.2d 257 (*Trujillo*) attempted to avoid service of process by entering his car and rolling up the window as the process server explained the nature of the documents and placed them under the windshield wiper in plain view, and the target then started the wipers to dislodge the papers. (*Id.* at pp. 259–260.) The court found the evidence supported a finding of personal service where the documents were left in the custody and control of the target with an explanation of their nature, the target knew the nature and purpose of the documents, and he deliberately attempted to avoid service. (*Id*. at p. 260.)

Service was found effective in *Crescendo Corp*. where a process server knocked on the door of the target's apartment and heard a man say if it was for him to say he was not home; a woman opened the door and the process server saw a man in the apartment whom he recognized as the target; the woman said the target was not home and as she closed the door the process server stated loudly that he was serving the target with a copy of unlawful detainer papers; and he placed the papers under the windshield wiper of a car in the carport registered to the target. (*Crescendo Corp*., *supra*, 267 Cal.App.2d at p. 211.) The reviewing court found the evidence sufficient to support the trial court's necessarily implied finding that the process server attempted personal delivery but was prevented by the target himself. (*Id*. at p. 213.) The court found no due process violation and no abuse of discretion in the denial of the defendant's motion to set aside the default judgment. (*Ibid*.)

Citing *Ball*, the *Crescendo Corp*. court explained: "The individual upon whom the process server attempts to make personal service by manual delivery may not be heard to

claim that service was improper because he refused to accept service." (*Crescendo Corp., supra,* 267 Cal.App.2d at p. 213.) The court elaborated: " 'Personal service usually contemplates actual delivery. But the person on whom service is sought may not, by merely declining to take the document offered, deny the personal service on the ground of lack of delivery, where under the circumstances it would be obvious to a reasonable person that a personal service was being attempted. In such case the service may be made by merely depositing the process in some appropriate place where it would be most likely to come to the attention of the person being served.' " (*Id*. at p. 212.)

Defendant argues this line of cases does not apply because "there is no hint or suggestion" that he attempted to avoid service, and the facts are analogous to those in *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829 in which personal service was not effected. There a process server delivered a summons to the target's wife in the driveway of their home with the wife's "promise to see that her 'husband gets them.' " (*Id*. at p. 831.) The husband was on the premises but out of view, and the process server did not attempt to contact him. (*Ibid*.) Distinguishing *Ball* and *Trujillo* in which "the strict requirements of manual delivery are relaxed" when a target attempts to flee a process server, the court in *Sternbeck* noted the target was within easy reach of the process server who chose not to walk the extra 100 feet to deliver the summons. (*Id*. at p. 833.)

Here substantial evidence supports a finding that defendant was present in the home, knew personal service was being attempted, and refused to accept service. The process server was familiar with defendant's residence, and he believed the person answering the door to be defendant's son based on past contact. Although the process server did not see defendant, he was able to confirm defendant's presence based on his hearing the substance of the son's conversation with someone in the house. The son told the process server he would get defendant, and the process server heard the response, "tell them that I'm not home." From this the server could infer the other person was defendant. The process server then announced to defendant that he was being served

with a restraining order, and he dropped the papers at the threshold. (See *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183 [personal service accomplished by " 'drop service' " before the target who answered the door of his residence but refused to identify himself to the process server after being informed by the server that he had legal papers for the target].) The process server visited defendant's home three days before the restraining order was set to expire. Defendant was aware of the expiration date, as the date was clearly noted on the face of the order, and in 2015 defendant had asked the court to vacate the order. Defendant was also familiar with the mechanisms of process serving: he was personally served with the original request for restraining order and notice of hearing by a process server in 2013 after failed personal service attempts by the sheriff, and he himself engaged the sheriff's office to personally serve plaintiff twice in January 2015. The process server had also staked out defendant's home in 2015 in an unsuccessful effort to serve defendant with the order to show cause and affidavit for contempt in this case.

Defendant argues the service was not in substantial compliance with the statutory notice provision because there is no evidence that he received actual notice of the hearing, citing *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 855 ("a finding of substantial compliance can only be sustained where (1) the record shows partial or colorable compliance with [statutory notice]; (2) the service relied upon by the plaintiff imparted actual notice to the [target]; and (3) the manner and objective circumstances of service were such as to make it highly likely that it would impart such notice"). To the extent *Haller's* substantial compliance test applies to the *Ball* line of cases in which a target refuses or evades personal service, the "actual notice" prong of the test is satisfied where, as here, the process server announced service within earshot and dropped the papers, despite defendant's refusal to come to the door.

The trial court acted within its discretion when it rejected defendant's version of events, accepted the process server's description, and denied the motion to set aside the order.

III. DISPOSITION

The order denying defendant's motion to set aside the renewed civil harassment restraining order without prejudice is affirmed.

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Grover, J.

WE CONCUR:

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Mihara, Acting P. J.

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Danner, J.